CIMB INVESTMENT BANK BHD

v.

ERNST & YOUNG & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI JC
[CIVIL SUITS NO: 22NCC-422-03-2012
& 22NCC-431-03-2012]
24 SEPTEMBER 2013

TORT: *Negligence - Duty of care - Audit reports prepared for fund manager - Reliance on audit reports by fund manager's clients to make investment decisions - Whether audit reports prepared for limited purpose - Whether investors were intended recipient of audit reports - Whether auditor owed duty of care to investors under common law and/or Companies Act 1965 and Securities Industry Act 1983*

The two suits here were between (i) CIMB Investment Bank Bhd ('CIMB') and Ernst & Young ('Ernst') ('Suit 422'), and (ii) between the plaintiffs, who were the investors in funds managed by SJ Asset Management Sdn Bhd ('SJAM'), and Ernst and three others ('Suit 431'). The core business of SJAM was the management of funds of its clients. It held a fund managers license under the Securities Industry Act 1983 ('SIA') and subsequently under the Capital Markets and Securities Act 2007 ('CMSA'). The plaintiffs had appointed the SJAM to act as their consultant, adviser and manager in respect of their financial investment and to manage the funds deposited by the plaintiffs in SJAM for the purpose of the investment. SJAM was also engaged by CIMB as a sub-investment manager to manage investment made by CIMB on behalf of its clients. Ernst produced the following audit reports pursuant to the engagement by SJAM: (i) statutory audits in accordance with the Companies Act 1965 ('CA') for the financial years ended 31 December 2002 to 31 December 2009 ('the CA audit'); and (ii) the audits in accordance with the SIA for SJAM for the financial year ended 31 December 2003 to 31 December 2006 ('the SIA audits'). As a result of the fraud committed by SJAM, CIMB's clients claimed against it in respect of their investments in SJAM. The Securities Commission ('SC') revoked the CMSA licence of SJAM and SJAM was subsequently wound up. The investors in Suit 431 and CIMB filed the actions against Ernst for negligence and breach of statutory duties in respect of

A the statutory audits carried out by Ernst on SJAM under the CA, SIA and CMSA. Essentially, the issue for the court's determination was whether there was any duty of care owed by Ernst to CIMB and the investors, as clients and investors of SJAM, under the common law and/or under the CA and SIA.

B

Held (dismissing claims with costs):

(1) Even though 'foreseeability' is a necessary threshold requirement, it is insufficient by itself to find a duty of care. Even if Ernst could have foreseen that their audit reports C would be relied on by any third parties, including the plaintiff investors and CIMB, it was not the determining factor to ascertain a duty of care. One of the factors to be taken into account is the issue of proximity. CIMB and the investors were not the original and intended recipient of the audit D reports, but SJAM and its shareholders in the general meeting, whereas the SIA reports are only meant for the SC. (paras 18, 19 & 23)

(2) There were also various disclaimers as to the purpose for E which the audit reports were made and who may rely on the same. It was clear from the documents that Ernst had never intended that the documents were to be relied by other third parties. The reports were prepared pursuant to the letters of engagement between Ernst and SJAM, to the exclusion of F others. (paras 24, 25 & 26)

(3) Ernst had provided the annual audit reports, the CA audit reports to the members of SJAM in the general meeting. The purpose of the audit reports was not for making investment G decisions. The statutory purpose of SIA audits was to enable SJAM to furnish such information to the SC as might be required. Similarly it was not for the purpose of making investment decisions. In the circumstances, there was no close and direct relationship of proximity between Ernst and CIMB H and the investors. Hence, under common law, there was no duty of care owed by Ernst to CIMB and the investors in carrying out the statutory audits for SJAM under the CA and the SIA. (paras 27, 28, 31 & 32)

I

(4) The purpose of CA audits is to inform members of the company of the transactions and financial position of the company. It is an internal financial matter on the assets and liabilities of the company and does not deal with assets that do not belong to the company. As such, it was for limited purpose and thus, no duty arose to a third party. (para 41)

(5) The SIA audit reports were merely compliance audit and not an investigative audit. This was evidenced from the requirements specified by the SC in 'Lampiran A' which includes the ascertainment of whether the clients money were separately maintained, whether it was used to pay the fund managers' liabilities and whether the clients' monies were deposited in the trust accounts not later than the next day. There was also checklist on the clients' investments, such as the nature of investment and whether the clients' investment were executed in accordance with the clients' mandates. The emphasis was to ascertain the segregation of the accounts, *ie*, that segregation existed and not to look into the operation of the funds itself. Therefore, as the SIA audit was for a limited purpose of compliance with SIA, no wider duty arose from the same. (paras 46 & 48)

(6) Both CIMB and the investors agreed that if the fund manager fails to comply with his duties under the SIA, it will be guilty of an offence as provided under s. 47C(9) of the SIA. The SC may also take other measures, including prohibiting the fund manager from entering into certain transactions or carry on the business or that the clients' assets be transferred to another person. Since the SIA has clearly provided for some other means of enforcing the duty of the fund manager, the statutory right was intended to be enforceable by that means and not by private right of action. Hence, there was no duty of care to third parties arising from the statutory provisions under which Ernst was required to perform the statutory audits on SJAM under the CA and SIA. (paras 49 & 50)

Case(s) referred to:

Aun Huat & Brothers Sdn Bhd & Ors v. Sime Darby Bhd & Anor [2013] 8 CLJ 32 HC ***(refd)***

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Jaafar Mohd Khalid v. Hong Leong Bank Bhd [2013] 8 CLJ 869 CA ***(refd)***

James McNaughton Paper Group Ltd v. Hicks Anderson & Co [1991] 2 QB 113 ***(refd)***

A *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors [2012] 9 CLJ 699 CA* ***(refd)***
Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a firm) [2009] 2 BCLC 563 ***(refd)***
X (Minors) v. Bedfordshire CC [1995] 3 WLR 152 ***(refd)***

B **Legislation referred to:**
Rules of Court 2012, O. 14A, O. 33 r. 2
Securities Commission Act 1993, s. 33A(9), (100)
Securities Industry Act 1983, ss. 40B, 47B(1), 47C(9), 49(1)

C *(Suit No: 22NCC-422-03-2012)*
For the plaintiff - Rabindra S Nathan (Lukas Lim Xia Wei with him); M/s Shearn Delamore & Co
For the 1st defendant - Loh Siew Cheang; M/s Cheang & Ariff

(Suit No: 22NCC-431-03-2012)
D *For the plaintiff - Fiona Bodipalar (Thivina Kumaran with her); M/s Bodipalar Ponnudurai De Silva*
For the 1st defendant - Loh Siew Cheang (Kelvin Seet Wan Nam & Vende Chai with him); M/s Cheang & Ariff
For the 4th defendant - Josephine Chin; M/s Lee Hishammuddin, Allen & Gledhill

E *Reported by S Barathi*

JUDGMENT

F **Azizah Nawawi JC:**

Civil Suit No: 22NCC-422-03-2012 ('Suit 422')

[1] Suit 422 is between CIMB Investment Bank Bhd ('CIMB') and Ernst & Young ('E&Y'). In *CIMB Investment Bank Berhad v. Ernst & Young (sued as a firm)* [2013] 1 AMCR 398, this court has allowed E&Y's application dated 30 August 2012 pursuant to O. 33 r. 2 and/or O. 14A of the Rules of Court 2012 (ROC 2012) for the following questions to be determined or tried as preliminary issues before the trial of this action:

(a) Whether the defendant ('E&Y'), when carrying out the statutory audits in accordance with the Companies Act 1965 ('CA') for SJ Asset Management Sdn Bhd ('SJAM') and issuing the reports dated 28 March 2003, 30 March 2004, 31 March 2005, 24 March 2006, 29 March 2007, 27 March 2008, 31 March 2009 and 19 April 2010 ('CA audit reports'), owed a duty of care to:

(i) the plaintiff ('CIMB'), an investment adviser allegedly acting on behalf of its clients, which allegedly relied on the CA audit reports to make, advise or facilitate investments for or on behalf of its clients, and not on its own behalf; and

(ii) any client or investor of SJAM (including CIMB's clients), whether known and existing or unknown and potential as an indeterminate class of persons who allegedly relied on the CA audit reports to make investment decisions.

(b) Whether E&Y, when carrying out the audits in accordance with the Securities Industry Act 1983 ('SIA') for SJAM and issuing the reports dated 30 March 2004, 31 March 2005, 24 March 2006 and 29 March 2007 ('SIA audit reports'), owed a duty of care to:

(i) CIMB, an investment adviser allegedly acting on behalf of its clients, which allegedly relied on the SIA audit reports to make, advise or facilitate investments for or on behalf of its clients, and not on its own behalf; and

(ii) any client or investor of SJAM (including CIMB's clients), whether known and existing or unknown and potential, as an indeterminate class of persons who allegedly relied on the SIA audit reports to make investment decisions.

Civil Suit No: 22NCC-431-03-2012 ('Suit 431')

[2] Suit 431 is between the plaintiffs, who are the investors in funds managed by SJAM, and E&Y and three others. On 14 March 2013, by consent of the parties, this court had allowed encl. (55), that pursuant to O. 33 r. 2 and/or O. 14A of the ROC 2012, the following questions are to be determined or tried as preliminary issues before the trial of this action as between the plaintiffs ('the investors') and the first defendant, E&Y:

(i) Whether the first defendant ('E&Y'), when carrying out the statutory audits in accordance with the Companies Act 1965 ('CA') for SJ Asset Management Sdn Bhd ('SJAM') and issuing the reports dated 28 March 2003, 30 March 2004, 31 March 2005, 24 March 2006, 29 March 2007, 27 March 2008, 31 March 2009 and 19 April 2010 ('CA audit reports'), owed a duty of

care and/or statutory duty to the plaintiffs as clients or investors of SJAM who allegedly relied on the CA audit reports to make investment decisions; and

(ii) Whether E&Y, when carrying out the audits in accordance with the Securities Industry Act 1983 ('SIA') for SJAM and issuing the reports dated 30 March 2004, 31 March 2005, 24 March 2006 and 29 March 2007 ('SIA audit reports'), owed a duty of care and/or statutory duty to the plaintiffs as clients or investors of SJAM who allegedly relied on the SIA audit reports to make investment decisions.

The Salient Facts

[3] In Suit 431, the plaintiffs are the investors who have appointed the fourth defendant, SJAM to act as their consultant, adviser and manager in respect of their financial investment and to manage the funds deposited by the plaintiffs in SJAM for the purpose of the investments.

[4] In Suit 422, SJAM was engaged by the CIMB as a sub-investment manager to manage investment made by CIMB on behalf of its clients.

[5] The core business of SJAM was the management of funds of its clients, including the plaintiffs. SJAM held a fund managers licence under the SIA and subsequently under the Capital Markets and Services Act 2007 ('the CMSA').

[6] E&Y was engaged by SJAM to perform the following services:

(i) Statutory audits in accordance with the Companies Act 1965 for the financial years ended 31 December 2002 to 31 December 2009 ('the CA audit'); and

(ii) the audits in accordance with the Securities Industry Act 1983 ('SIA') for SJAM for the financial year ended 31 December 2003 to 31 December 2006 inclusive (the 'SIA audits').

[7] In pursuance of the aforesaid engagements, E&Y produced the corresponding audit reports (collectively referred to as the 'audit reports').

[8] As a result of the fraud committed by SJAM, the CIMB's clients made claims against it in respect of their investments in SJAM.

[9] CIMB voluntarily compensated its clients for the fraud committed by its fund manager, SJAM, and its clients transferred their rights and interests in the investment (from SJAM) to CIMB.

[10] The Securities Commission proceeded to investigate SJAM and revoked its capital market services licence under the capital markets and Services Act 2007 (CMSA) on 23 July 2010. On 27 July 2012, the SC filed a winding up petition against SJAM and SJAM was wound up by the court on 14 October 2010.

[11] The investors in Suit 431 and CIMB filed these actions against E&Y for negligence and breach of statutory duties in respect of the statutory audits carried out by the E&Y on SJAM under the CA, the SIA and the CMSA.

The Findings Of The Court

[12] Essentially, the issue here is whether there is any duty of care owed by the auditor, E&Y to CIMB and the investors, as clients and investors of SJAM:

(i) under common law; and/or

(ii) under the CA and SIA,

when E&Y carried out the statutory audits for SJAM under the CA and the SIA.

[13] If this court answered the questions in the negative, that is, there is no duty owed by E&Y, the auditor of SJAM to the third parties, namely CIMB and the investors in carrying out the statutory audits for SJAM under the CA and the SIA, then the whole case against E&Y must fail. If the answers to the questions are in the affirmative, then the case will proceed to ascertain whether there is any breach of the said duties and the consequential damages arising from the said breaches.

Whether There Is Any Duty Of Care Under Common Law

[14] It is the submission of learned counsel for E&Y, Dato' Loh Siew Cheang that the auditors only owe a duty of care to the company, SJAM for the benefit of its shareholders as a general body and not to any individual shareholder and any third party. The plaintiffs, as clients or investors of SJAM are third parties. They have no contractual relationship with E&Y. The same position goes to CIMB, as CIMB does not have any contractual relationship with E&Y.

[15] Learned counsel relied on the case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 which was reaffirmed by the House of Lords in *Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a firm)* [2009] 2 BCLC 563, where the court held at p. 575:

> The leading authority is *Caparo Industries Plc v. Dickman* [1990] BCLC 273 [1990] 2 AC 605. The duties of an auditor are founded in contract and the extent of the duties undertaken by contract must be interpreted in the light of the relevant statutory provisions and the relevant auditing standards. *The duties are duties of reasonable care in carrying out the audit of the company's accounts. They are owed to the company in the interests of its shareholders. No duty is owed directly to the individual shareholders*. This is because the shareholders' interests are protected by the duty owed to the company. No duty is owed to creditors - *Al Saudi Banque v. Clark Pixley (a firm)* [1990] BCLC 46, [1990] Ch 313. (emphasis added)

[16] Under common law, the case of *Caparo* held that three elements are required to establish a duty of care for claims in pure economic loss, that is:

(i) foreseeability;

(ii) a close and direct relationship of 'proximity' between the parties; and

(iii) it is fair and reasonable to impose liability.

[17] The *Caparo* case was applied by our Court of Appeal in *Jaafar Mohd Khalid v. Hong Leong Bank Bhd* [2013] 8 CLJ 869 where the Mohd Hishamudin Yunus JCA held as follows:

> Our second ground in dismissing the plaintiff's claim for the tort of negligence against the defendant bank is that the plaintiff has failed to show that the defendant bank owes him a duty of care. In the House of Lords case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 Lord Bridge of Harwich summarized the principle on duty of care as follows:
>
> > What emerges is that, in addition to the foresee ability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighborhood' and that the situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[18] Even though 'foreseeability' is a necessary threshold requirement, it is insufficient by itself to find a duty of care. Even if E&Y could have foreseen that their audit reports will be relied by any third parties, including the plaintiff investors and CIMB; it is not the determining factor to ascertain a duty of care. In *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors* [2012] 9 CLJ 699; [2013] 1 MLJ 27, the Court of Appeal held at p. 41:

> We are, however, prepared to accept the plaintiff's contention that the defendants, as the architects of the project, would be able to foresee that the various acts or omissions complained of, assuming for the moment that the allegations to some extent are true, would result in a delay in obtaining the CFOs and consequential financial loss to the plaintiffs. **But 'foreseeability of harm or damage' is not the only test or factor in determining the existence of a duty of care**. In other words, as a matter of law, **foreseeability of injury or damage does not automatically lead to a duty of care** (see *Simaan Contracting Co v. Pilkington Glass Ltd (No 2)* [1988] QB 758; and *Man B & W Diesel*). As a matter of law, there are other considerations to be taken into account as well. (emphasis added)

[19] One of the factors to be taken into account is the proximity issue. In *Caparo* case, Lord Bridge at 655E held:

> Once foreseeability of likely harm from a careless statement has been established, it becomes necessary to examine the circumstances in and the purposes for which the statement was made in order to determine whether there are also present further ingredients necessary to establish proximity of relationship between the maker of the statement and the person who has acted upon it.

[20] It is the submission of learned counsel for E&Y that the requirement of 'proximity' cannot be satisfied by the undisputed facts of these cases:

(i) that CIMB and the plaintiffs are not the original and intended recipients of the audit reports, but SJAM and its shareholders in the general meeting;

(ii) that there are disclaimers as to the purpose for which the audit reports were made and who may rely on the same; and

(iii) the purpose of the reports was not for making investment decisions.

Issue (i) – That CIMB And The Plaintiff Investors Are Not The Original Or Intended Recipients

[21] It is not in dispute that E&Y had provided the annual audit reports ('CA audit reports') to the members of SJAM in the general meeting, with the heading that reads 'Report of the Auditors to the Members of SJ Asset Management Sdn Bhd'.

[22] The SIA audit reports were reports meant only to the SC, which reads:

> Our report is solely for use in connection with your submission of the Appendix B to the Securities Commission as required under section 49 of the Securities Industry Act 1983 and the Securities Industry Regulations 1996.

[23] In the premise, I am of the considered opinion that CIMB and the investors are not the original and intended recipients of the audit reports, but SJAM and its shareholders in the general meeting; whereas the SIA reports are only meant for the SC.

Issue (ii) - The Disclaimers

[24] There are various disclaimers as to the purpose for which the audit reports were made and who may rely on the same. In the letter of engagement dated 7 February 2003 for CA audit for the financial year ended 31 December 2002, it is stated that:

> We will issue a report to members of the Company pursuant to Section 174 of the Companies Act ("Act") 1965 as to whether, in our opinion, the financial statements have been properly prepared in accordance with the Act and applicable Approved Accounting Standards in Malaysia so as to give a true and fair view of ...
>
> *Our audit opinion is intended for the benefit of those to whom it is addressed. The audit will not be planned or conducted in contemplation of reliance by any third party or with respect to any specific transaction.* Therefore, items of possible interest to a third party will not be specifically addressed and matters may exist that would be assessed differently by a third party, possibly in connection with a specific transaction. (emphasis added)

[25] The SIA audit reports which were intended solely for use in connection with SJAM's submission to the SC also contain the disclaimer clause. In the letter of engagement dated 1 March 2004 for the financial year ended 31 December 2003 it states that:

> Our report will be addressed to you as directors of the Fund Manager and is solely for use in connection with your submission of Lampiran A to the SC as required under Section 40B of the Securities Industry Act 1983. *Our report should not be used or reproduced, in part or in whole, or relied upon for any other purposes. Ernst & Young ("EY") assumes no responsibility whatsoever for any loss or damage arising out of or in connection with the reliance on our report by any party for any other purposes whatsoever.* If other parties choose to rely in any way on the contents of this report they will be considered to do so entirely at their own risk. (emphasis added)

[26] From the said documents, it is clear that E&Y never intended that the documents are to be relied by other third parties. The said reports are prepared pursuant to the letters of engagement between E&Y and SJAM, to the exclusion of others.

Issue (iii) - The Purpose Of The Reports

[27] I agree with the submission of learned counsel for E&Y that the purpose of the audit reports was not for making investment decisions. It is not in dispute that E&Y had provided the annual audit reports, the CA audit reports to the members of SJAM in the general meeting.

[28] On the other hand, the statutory purpose of SIA audits is to enable SJAM to furnish such information to the SC as may be required. Similarly, it is not for the purpose of making investment decisions as the plaintiffs claimed they did in the manner set out in para. 30 of the statement of claim. Section 40B of the SIA reads:

> A dealer, fund manager or investment adviser shall furnish such returns and provide such information relating to its business as the Commission may require.

Section 49(1) of the SIA reads:

> A relevant person shall, within three months after the close of each financial year, or such further period as the Commission may permit under subsection (2), lodge with the Commission the auditor's report containing information on such matters as may be prescribed.

[29] In *James McNaughton Paper Group Ltd v. Hicks Anderson & Co* [1991] 2 QB 113, the English Court of Appeal emphasised the importance of ascertaining the purpose for which information was required to be given when determining whether a duty should be imposed.

[30] In *Caparo* case, the argument that a duty of care existed because of the provisions of the Companies Act in relation to the annual audits was rejected because the statutory purpose of the CA audit reports is not for the purpose of making investment decisions or to enable third parties to rely on the same to make investment decisions as the plaintiffs claimed they did in the manner set out in para. 30 of the SOC.

[31] In the premise, I am of the considered opinion that because CIMB and the investors are not the original and intended recipients of the audit reports, the disclaimers and that the purpose of the reports was not for making investment decisions, I find that there is no close and direct relationship of 'proximity' between E&Y and CIMB and the investors.

[32] Therefore, I am of the considered opinion that under common law, there is no duty of care owed by E&Y to CIMB and the investors in carrying out the statutory audits for SJAM under the CA and the SIA.

Whether There Is Any Statutory Duty Of Care

[33] The next issue is whether a duty of care arises from the statutory provisions under which E&Y is required to perform the statutory audits on SJAM under the CA and the SIA to third parties.

[34] In *Caparo* case, the House of Lords said that it is a legislative function to extend a duty of care based on foreseeability to third parties. Lord Bridge said at p. 623E:

> The only support for an unlimited duty of care by auditors for the accuracy of their accounts to all who may foreseeably rely upon them is found in some jurisdictions in the United States of America where there are striking differences in the law in different states. In this jurisdiction I have no doubt that the creation of such an unlimited duty would be a legislative step which it would be for Parliament, not the courts, to take.

[35] It is the submission of the CIMB and the investors that the main purpose of the SIA audits report is ultimately to ensure the protection of investors who place their funds on trust with fund managers such as SJAM. This is because the purpose of the audit to twofold:

(i) to ensure compliance with the SIA; and

(ii) to detect any non-compliance by the fund managers in relation to the management of the clients' asset.

[36] E&Y however submits that that the SIA audit were compliance audit reports to the SC to inform the SC whether SJAM as a licensee had:

(i) carried out its business in compliance with the provisions of the SIA;

(ii) conducted its business in compliance with the checklist issued by the SC under s. 40B; and

(iii) whether SJAM had under s. 47B(1) kept proper accounting records as will sufficiently explain the transactions and financial position of SJAM's business, enabling a true and fair profit and loss accounts to be prepared, including whether the same had been kept in a form and manner to enable them to be conveniently and properly audited.

[37] In *Tort Law* (3rd edn.) by Nicholas J MacBride and Roderick Bagshaw, the authors explain that to ascertain the remedies for breach of statutory duty depends on legislative intent in that:

> ... By definition the breach of a statutory duty that is owed to no one in particular cannot amount to a tort. But even the breach of a statutory duty that is owed to another will usually not amount to a tort. The breach of a statutory duty that is owed to another will only amount to a tort if when Parliament created that duty it intended that breach of that duty should be treated as a tort by the courts and therefore that all the remedies that are normally available when someone has committed a tort should apply to the breach of that statutory duty. As this is a bit of a mouthful, let's just say that the breach of a statutory duty owed to another will only amount to a tort if Parliament intended, when it creates that duty, that breach of that duty should be actionable.

[38] In *X (Minors) v. Bedfordshire C.C.* [1995] 3 WLR 152 HL, Lord Browne-Wilkinson explained the mode of ascertaining statutory duties as follows:

> The principles applicable in determining whether such statutory cause of action exists are now well established although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v. Wandsworth Stadium Ltd.* [1949] AC 398; *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] AC 173. However the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages notwithstanding the imposition by the statutes of criminal penalties for breach: see *Groves v. Wimborne (Lord)* [1898] 2 QB 402.

[39] In *Aun Huat & Brothers Sdn Bhd & Ors v. Sime Darby Bhd & Anor* [2013] 8 CLJ 32, Justice Kang Hwee Gee had to ascertain whether s. 33A(9) and (100) of the Securities Commission Act conferred private law cause of action. This is what he said:

> ... To decide whether they had a cause of action it would be *necessary to go further to examine the Act and the code in order to determine their purpose, in particular, whether they were enacted to protect the class of persons to which the plaintiffs belong*. This is a matter of construction of the Act read with the code to determine the legislative intent ... (emphasis added)

[40] Therefore, the pertinent question here in order to ascertain whether the CA and the SIA imposed the necessary statutory duties, is to ascertain the purpose and the ambit of the CA audits and the SIA audits, as the investors submit that the premise of their claim against E&Y is that they relied on the E&Y 'clean' and unqualified audit reports on SJAM to continue placing their funds with SJAM. The investors submit that they did not rely on the contents of the audit report *per se* to guide their investment decisions, but they relied on E&Y to carry out the audits properly and to produce accurate audit report in accordance with their obligations under the CA and the SIA.

[41] With regards to the CA audits, I agree with learned counsel for E&Y that the purpose of such audits is to inform members of the company of the transactions and financial position of the company. This is an internal financial matter on the assets and liabilities of the company and does not deal with assets that do not belong to the company. As such, it is for a limited purpose and thus no duty arises to a third party.

[42] The SIA audit reports comprise of three reports, a checklist issued by the SC ('Lampiran A') under s. 40B, Form 9 and Form 10. The SIA reports were addressed to the SC in its role as a licensor of SJAM.

[43] With regards to the SIA audits, it is the submission of CIMB and the investors that the SIA reports are to be given to the SC for the purpose of informing the SC in its capacity as licensor whether SJAM as a licensee has complied with the obligations that are binding on SJAM. The said obligations includes the duty to ensure that the clients' funds and asset are only used for their proper purpose and to make sure that the said funds are segregated from the fund manager's own assets. The investors also submit that E&Y, in preparing the SIA audit reports must have to examine whether the fund manager has in fact complied with these obligations, by inspecting both the fund manager's and its clients accounts.

[44] Therefore, it is the submission of Miss Fiona that bearing in mind that the SIA audit framework is not merely to ensure compliance but also to detect any non-compliance by the fund managers, the main purpose of the SIA audits report is ultimately to ensure the protection of investors who had placed their funds with SJAM.

[45] Learned counsel for E&Y submits that the SIA audit reports are merely compliance report, in that these are reports to the SC informing whether SJAM as a licensee had:

(i) carried out its business in compliance with the provisions of the SIA;

(ii) conducted its business in compliance with the checklist issued by the SC under s. 40B; and

(iii) whether SJAM had under s. 47B(1) kept proper accounting records as will sufficiently explain the transactions and financial position of SJAM's business.

[46] Having considered the submissions of parties, I am of the considered opinion that the SIA audit reports are merely compliance audit and not an investigative audit. This is evidenced from the requirements specified by the SC in "Lampiran A", the checklist for fund managers. "Lampiran A" includes the ascertainment of whether the clients money are separately maintained, whether it is used to pay the fund managers' liabilities and whether the clients' monies are deposited in the trust accounts not later than the next day. There is also a checklist on the clients' investments, such as the nature of investment and whether the clients' investment are executed in accordance with the clients' mandates.

[47] Form 10 is the fund manager's profit and loss statement which forms part of the audit accounts and to be prepared by the fund manager. Form 9 is the audited accounts of the fund manager furnished to the SC. In para. 1 of Form 9, the auditor is required to make a statement to the SC as follows:

> 1. After making due inquiry, we are of the opinion that the records arising from transactions conducted by the fund manager during the financial year for clients and the fund manager's own accounts were properly segregated in accordance with the requirements of the Securities Industry Act 1983.

[48] Again, the emphasis is to ascertain the segregation of the accounts, the clients' monies from the fund manager's accounts. It is merely to ascertain that segregation existed, not to look into the operation of the funds itself. Therefore, as the SIA audit is for a limited purpose of compliance with the SIA, no wider duty arises from the same.

[49] No doubt that s. 47 of the SIA sets out the duties of the fund managers in relation to the investors' trust accounts as well the strict requirements and procedures concerning the dealing of the trust account by the fund manager. It is also to be noted that both CIMB and the investors agreed that if the fund manager fails to comply with his duties under the SIA, it will be guilty of an offence as provided under s. 47C(9) of the SIA. The SC may also take other measures, including prohibiting the fund manager from entering into certain transactions or carry on the business or that the clients' assets be transferred to another person. Therefore, since the SIA has clearly provides some other means of enforcing the duty of the fund manager, this means that the statutory right was intended to be enforceable by those means and not by private right of action. (see *X (Minors)*).

[50] In the premise, I am of the considered opinion that there is no duty of care to third parties arising from the statutory provisions under which E&Y is required to perform the statutory audits on SJAM under the CA and the SIA. The statutory provisions under which E&Y is required to perform the statutory audits on SJAM under the SIA is not intended to protect third parties in their investment decisions, as they are merely compliance audits. Further, as the SIA provides an enforcement provision against statutory non-compliance by the fund managers, no private right of action accrues.

[51] To conclude, the answers to both questions in encl. (10) and (55) are in the negative. As such, the claims against E&Y by CIMB and investors are dismissed with costs.